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Restorative justice

Report of the Secretary-General

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I. Introduction

1. The present report is submitted to the Commission on Crime Prevention and Criminal Justice in accordance with Economic and Social Council resolutions 1999/26 of 28 July 1999 and 2000/14 of 27 July 2000.

2. In its resolution 2000/14, the Economic and Social Council requested the Secretary-General to seek comments from Member States and relevant intergovernmental and non-governmental organizations, as well as the institutes of the United Nations Crime Prevention and Criminal Justice Programme network, on the desirability and the means of establishing common principles on the use of restorative justice programmes in criminal matters, including the advisability of developing an instrument. Preliminary draft elements of a declaration of basic principles on the use of restorative justice programmes in criminal matters were annexed to the resolution for consideration.

3. In resolution 2000/14, the Council also requested the Secretary-General to convene, subject to the availability of voluntary contributions, a meeting of experts selected on the basis of equitable geographical representation to review the comments received and to examine proposals for further action in relation to restorative justice. The meeting of the Group of Experts on Restorative Justice was hosted by the Government of Canada in Ottawa, from 29 October to 1 November 2001. The report of the meeting is before the eleventh session of the Commission as an addendum to the present document (E/CN.15/2002/5/Add.1).

4. The present report contains an analysis of the comments received by the Secretary-General, pursuant to resolution 2000/14. The report of the meeting of the Group of Experts includes the recommendations of the Group, as well as the revised draft principles on the use of restorative justice, which were reviewed and amended at the meeting.

II. Background

5. In recent years, restorative justice has been given considerable attention by practitioners and policy makers as an alternative approach to criminal justice practices. It was discussed during the Tenth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held in Vienna from 10 to 17 April 2000.[1] Participants agreed that the concepts of restorative justice should be fundamental elements in any discussion of accountability and fairness to offenders and victims in the justice process. The philosophy behind restorative justice was to manage the harm done and to restore the offender and the victim to their original status as far as possible. The participants were of the view that restorative justice presented alternative criminal justice options to established modes of trial and punishment and that it sought to include the community and society as a whole in the restorative process.

6. Restorative justice is also dealt with in paragraph 27 of the Vienna Declaration on Crime and Justice: Meeting the Challenges of the Twenty-first Century, adopted by the Tenth Congress (General Assembly resolution 55/59, annex). Following the Tenth Congress, a plan of action on restorative justice was developed and adopted by the Commission on Crime Prevention and Criminal Justice at its tenth session.[2] At the same session, the Commission noted that some Governments had expressed interest in the negotiation of a new international instrument dealing with restorative justice and mediation. Restorative justice has also been discussed at regional conferences. A national teleconference on restorative justice sponsored by the National Institutes of Correction was held in the United States of America in 1996 and a seminar on mediation and other means for alternative settling of disputes was held in Plovdiv, Bulgaria, in December 2000.

III. Analysis of comments provided

7. On 7 December 2000, the Secretary-General sent a note verbale to Governments and to relevant organizations inviting them to provide their views and observations pursuant to Economic and Social Council resolution 2001/14. By the end of May 2001, 37 Governments had responded: Argentina, Australia, Austria, Belarus, Belgium, Bolivia, Bulgaria, Canada, Costa Rica, Denmark, Ecuador, Fiji, Germany, Ireland, Italy, Japan, Kuwait, Malaysia, Mexico, Monaco, New Zealand, Norway, Oman, Pakistan, Peru, Philippines, Qatar, Republic of Korea, Saudi Arabia, Sierra Leone, Slovakia, South Africa, Sweden, Turkey, Ukraine,

United Kingdom of Great Britain and Northern Ireland and United States. Two entities of the United Nations system, the Division for the Advancement of Women of the Department of Economic and Social Affairs of the Secretariat and the Office of the Prosecutor for the International Tribunal for the Former Yugoslavia, also responded, as did two institutes of the United Nations Crime Prevention and Criminal Justice Programme network, the Asia and Far East Institute for the Prevention of Crime and the Treatment of Offenders and the International Centre for Criminal Law Reform and Criminal Justice Policy.

8. The following non-governmental organizations also responded: American Correctional Association, Andean Commission of Jurists, Asian Center for Youth, Defence for Children International, Friends World Committee for Consultation, International Community Corrections Association, Organismos no Gubernamentales del Estado de Sonora and Prison Fellowship International.

A. Comments on the establishment of common principles of restorative justice

9. Restorative justice is a concept that recognizes that a crime often affects not only the futures of victims and communities, but also those of the offenders involved. It seeks to restore all of the interests of all of the parties affected by a crime, to the extent possible using the active and voluntary involvement of the offenders, the victims and the communities. The term "restorative justice" itself was not defined in either of Economic and Social Council resolutions 1996/26 or 2000/14, but the Philippines did propose the following definition in its reply:

> "Restorative justice is an alternative measure in the criminal justice system that is not punitive in nature but rather seeks to render justice to offenders and victims alike, instead of tilting the balance heavily in favour of one of the stakeholders to the disadvantage of another. It seeks to re-establish social relationships that are the end point of restorative justice and seeks to address the wrongs in the doing and the suffering of a wrong that is also the goal of corrective justice."

10. The Friends World Committee for Consultation also provided a definition:

> "Restorative justice seeks to balance the concerns of the victim and the community with the need to reintegrate the offender into society. It seeks to assist the recovery of the victim and to enable all parties with a stake in the justice process to participate fruitfully in it."

11. The United States expressed the view that restorative justice had the potential to achieve multiple goals of ensuring the accountability of the offender, promoting restoration of the victim and benefiting the criminal justice system and community as a whole by involving all parties in the search for solutions that promote repair, reconciliation and reassurance. The United States also suggested that the practical application of restorative justice should be based on a shared set of principles and values. Reference was also made to the above-mentioned teleconference on restorative justice sponsored by the National Institutes of Correction (see para. 6), at which the following seven basic principles of restorative justice were recommended: (a) crime is an offence against human relationships; (b) victims and the community are central to justice processes; (c) the first priority of justice processes is to assist victims; (d) the second priority is to restore the community, to the degree possible; (e) the offender has personal responsibility to the victims and to the community for crimes committed; (f) the offender will develop improved competency and understanding as a result of the restorative justice experience; and (g) stakeholders share responsibilities for restorative justice through partnerships for action.

12. Many respondents (Argentina, Belgium, Bolivia, Mexico, Pakistan, Peru, Sierra Leone, South Africa and Turkey) shared the view that traditional criminal justice systems did not always provide the best possible outcomes in resolving conflicts among victims, offenders and communities. It was recognized that under current systems, victims, who suffered most from the crime, tended to remain unsupported, without receiving expeditious and appropriate remedies. Belgium, Sierra Leone and South Africa in particular noted a phrase contained in Economic and Social Council resolution 1999/26 that "traditional criminal justice mechanisms do not always provide an appropriate and timely response to those phenomena ...

restorative justice measures can lead to satisfaction for victims as well as to the prevention of future illicit behaviour and can produce viable alternatives to short terms of imprisonment and fines". One function of restorative justice is to provide a mechanism that can compensate for the defects in existing systems.

13. Argentina mentioned several merits of restorative justice. It tended to resolve conflict between victims and offenders in a non-adversarial manner, while preserving the option to revert to traditional judicial proceedings if those involved could not agree on restorative measures. It also made offenders confront their own actions and the consequences of those actions. Canada pointed out that restorative justice offered significant potential in collective efforts to reduce levels of conflict, promote healing and contribute to more peaceful and safer communities. Mexico was of the view that the use of restorative justice was a viable means of preventing conflicts, such as minor offences, family problems, school and community problems and problems involving youth, that might otherwise escalate to higher levels of confrontation and violence. Mexico also indicated that restorative justice would eliminate the disadvantages associated with deprivation of liberty for minor offences, thus reducing costs of imprisonment, and Pakistan and Qatar pointed to its potential to reduce prison overcrowding. Peru mentioned that basic trends in criminal law had been towards establishing guarantees for the offender, limiting the use of custodial sentences and taking preventive measures to protect other legal interests, but that the interests of victims had been neglected. Restorative justice measures tended to place victims on a more equal footing with offenders, restoring the balance.

14. A number of States reported that they had already implemented restorative justice measures in their criminal justice systems. Specific measures mentioned included mediation, probation, suspension of sentence, community service orders and restitution payments to victims.

15. In Germany, restorative justice measures were applicable to minor criminal offences. The public prosecution office and the courts were able to terminate criminal proceedings where the offender had made appropriate efforts to make reparation for the damage. In addition, the State was obliged to pay compensation to the victims of violent acts committed with intent. In Kuwait, the Criminal Procedure and Trial Law 17/1960 provided for reconciliation measures for sentences involving infringement of the inviolability of property, acts of wilful destruction of property, damage to property and threat of blackmail. In Malaysia, courts could release first-time offenders on probation for good conduct.

16. Oman applied Islamic law, which allowed amicable settlement of domestic conflicts. Muslim jurists approved settlements between the victim and the offender concerning bodily injury and Islamic law permitted the approval of such settlements even in serious offences such as murder. Qatar applied restorative justice measures in cases where this would not be prejudicial to the safety or security of society. Article 51 of the Penal Code of Qatar allowed for pardon and forgiveness for offences that did not affect the dignity, reputation or interests of the victim, while granting the victim the option of waiving or proceeding with the normal criminal process. In Peru, conciliation was possible in court proceedings relating to offences against honour and cases of injury caused by negligence. The Public Prosecutor's Office could decide not to prosecute in such cases if there was a voluntary offer of compensation by the offender or if the offence was a minor one, provided the victim agreed to civil compensation. In Peru, out-of-court settlements could be agreed upon by a conciliation centre or a qualified judge in accordance with Law No. 26872, article 5. In South Africa, a number of restorative justice initiatives had been taken as a result of the work of the Truth and Reconciliation Commission.

17. Many States had paid particular attention to implementing restorative justice measures in their juvenile justice systems. In Australia, "diversionary conferencing" had been tested since the early 1990s in every state and territory and in some states it was becoming established as a mainstream element of juvenile justice proceedings. In Germany, mediation was also applied to offences involving young people. In Malaysia, a juvenile offender could be released to his parent or guardian or be placed under a probation order pursuant to the Juvenile Courts Act of 1947. The South African Law Commission published a report in July 2000 presenting a draft bill on juvenile justice that had restorative justice as its central guiding principle. The Government of South Africa had also implemented a pilot project on family group conferences for child

offenders during 1996-1997. In Sweden, a one-person committee had been appointed to inquire into and analyse the role of mediation for young offenders in the legal system and to consider possible legislation on the matter. In the United Kingdom, recent youth justice reforms in England and Wales had incorporated restorative principles: the Youth Justice and Criminal Evidence Act of 1999 introduced referral orders under which a court could refer appropriate cases to youth offender panels. Those panels operated as community conferences, involving, where possible, community volunteers and victims. Restorative justice measures were also applied in some elements of the juvenile justice systems in Scotland and Northern Ireland.

18. Several States drew attention to relatively recent legislative measures that incorporated restorative justice measures. In Belarus, new substantive and procedural criminal legislation, which entered into force on 1 January 2001, contained restorative justice elements. Under that legislation, in "private charge cases", proceedings could be initiated by the victim, his or her legal representative or the representative of a juridical person. Once commenced, such proceedings could later be suspended if the parties so agreed. Ecuador had also recently amended its criminal law to provide alternative punishments, in particular for minor offences. Italy had reinforced the role of restorative schemes in criminal cases. Bolivia had established a new Code of Criminal Procedure, Law No. 1970, article 18 of which prescribed that private criminal actions would be brought exclusively by the victim of the offence.

19. Pilot projects on restorative justice are being implemented in a number of States. In 1997, Denmark initiated an extended pilot scheme of victim/offender mediation to supplement traditional criminal prosecution, which would continue until the summer of 2002. Norway instituted a new mechanism called "*konfliktråd*", which provided a form of arbitration between the victim and the offender. In New Zealand, funding has been provided for some 12 community-managed restorative justice programmes and 3 court-based restorative justice pilot projects. In Pakistan, the Government was introducing measures to settle minor disputes outside its formal criminal justice system under its devolution and judicial reform plans.

20. In addition, many States had conducted discussions and studies on restorative justice. In Bulgaria, there was public debate based on Recommendation No. R (99) 19 of the Committee of Ministers of the Council of Europe to Member States Concerning Mediation in Penal Matters. In Norway, a comprehensive study on the protection of and support for victims of crime was presented in 1992[3] and subsequently became the basis for a number of amendments to Norwegian legislation to strengthen the position of victims. In South Africa, the South African Law Commission published a number of publications relating to restorative justice. A study on restorative justice was conducted in Turkey.

21. Notwithstanding those developments, most respondents recognized that the application of restorative justice measures was still at an exploratory stage and that more information on their application and operation was needed. It was therefore considered worthwhile to discuss the matter during the eleventh session of the Commission, to exchange views and experiences and to develop common principles of restorative justice.

22. Some replies did raise cautions or concerns about the use of restorative justice measures and mentioned the need to ensure that measures applied were appropriate for the circumstances of cases where they were used. The joint reply submitted by the American Correctional Association, the International Community Corrections Association and Prison Fellowship International introduced a 2000 study issued by the International Scientific and Professional Advisory Council, entitled "An overview of restorative justice programmes and issues", drafted by Paul Friday of the World Society of Victimology, which set out some of the issues which the International Scientific and Professional Advisory Council felt should be addressed. In some cases, it was possible that restorative justice programmes could ultimately create processes so similar to those of adversarial courts that they undermined rather than supported restoration of the interests involved. In other cases, the legal basis of criminal procedure could become obscured. More fundamentally, it was noted that restorative justice measures, being applied on a case-by-case basis, generally failed to address the underlying aetiological factors associated with crime, such as poverty, racism and cultural and social values. The conclusions of the study stressed the need to develop guidelines for

applying restorative justice measures to address those concerns.

B. Comments on the advisability of developing an instrument on restorative justice

23. Most of the respondents expressed support for the idea of developing an international instrument and of those which addressed the issue, only Japan voiced specific concerns. Most also considered the proposed preliminary draft elements a good basis for discussion and expressed their willingness to support such discussions. In Japan's view, it would be more realistic to develop and apply restorative measures in the context of the variations of national criminal justice systems than to try to achieve international standardization through an instrument. In its opinion, the issues, such as how damage caused by crimes should be redressed and how victims of crimes should be reintegrated into society, were closely related to each country's criminal justice system and might vary from country to country. Japan also noted that, to some extent, restorative justice elements had already been incorporated into national systems on that basis.

24. Regarding the nature of the instrument, the United States considered it important that the new instrument be written in such a way as to encourage the adoption of the general principles and values upon which restorative justice was based, rather than focusing on one particular form of restorative justice. Japan, New Zealand and Sweden were of the view that any instrument should be non-binding. Sweden also stressed that restorative justice programmes should not interfere with States' rights to impose sanctions on criminals and underlined that restorative justice programmes should not interfere with the principles of penal law regarding proportionality, legality, equity, predictability and consistency in sentencing. Ecuador considered that when restorative justice measures were applied in criminal procedures, effective proportionality between the gravity of the offence and a corresponding punitive measure should always be borne in mind. The United Kingdom and the United States considered that restorative justice should be seen as a supplement to traditional criminal justice systems and not as an alternative to them. This contrasted with the view of the organization Defence for Children International, which took the view that common principles should clearly point out that this was a process and not a programme: that the process was a clear and distinctive alternative to the formal criminal and juvenile justice judicial process. Fiji and Ireland mentioned that the establishment of common principles should take into account different situations and views and Ireland specifically made reference to the differing views of the European Union and the Council of Europe. Ireland also mentioned that common principles should be coordinated with related regional initiatives.

25. With regard to the scope of application of restorative justice programmes, Kuwait stated that its law on reconciliation established restrictions on application, intended to prevent the reconciliation from being exploited as a subterfuge for criminals to elude punishment, to preserve the rights of the victim and society and to ensure adequate deterrence. Peru considered that restorative justice should only be applied to injury caused by negligence and to minor offences, subject to fundamental due process or procedural fairness.

26. Bolivia, Canada and Peru stressed that key elements in determining whether restorative justice should be used in particular cases were the need to ensure that everyone who participated did so voluntarily, sensitivity to possible imbalances of power between victims and offenders and issues relating to the safety or security of participants. Bolivia also mentioned that agreements or other outcomes should be reached by the parties voluntarily and should contain only reasonable and proportional obligations. The United States also underlined that it was important that victims be allowed to choose whether to participate, to determine the extent of their participation and to choose the point at which they would cease to participate. Concerning the balance of power between victims and offenders, Fiji and Mexico emphasized that programmes established in multilingual societies should provide for the right to have documents translated and proceedings interpreted into appropriate languages.

27. In connection with the operation of programmes, Argentina pointed out that mediation was often a viable alternation or additional means of resolving cases and, where it was tried without success, it was still possible to revert back to more conventional judicial proceedings. Argentina also considered that

confidentiality was an essential element in implementing restorative justice measures. In relation to that point, Germany stressed that legislation on restorative justice should contain a data protection provision, which would restrict the use of communicated and collected data solely for use in mediation.

28. Ireland, Sweden, the Asia and Far East Institute for the Prevention of Crime and the Treatment of Offenders and Defence for Children International all emphasized that the process and outcomes of restorative justice programmes should be monitored, assessed and evaluated for use in the further development of such programmes.

29. Some respondents referred to existing international instruments that contained elements relating to restorative justice, such as the United Nations Convention against Transnational Organized Crime and its Protocols (General Assembly resolutions 55/25, annexes I-III, and 55/255, annex), the Convention on the Rights of the Child (resolution 44/25, annex), the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (resolution 40/33, annex) and the United Nations Guidelines for the Prevention of Juvenile Delinquency (resolution 45/112, annex), and suggested that they should be taken into account when developing any new instrument on restorative justice.

C. Specific comments on the preliminary draft elements of a declaration of basic principles on the use of restorative justice in criminal matters

30. Comments received included the specific notes below on the draft elements annexed to Economic and Social Council resolution 2000/14.

1. General comments

31. Costa Rica indicated that the draft elements should include the principle of non-discrimination and impartial application in order to avoid differences based on race, colour, sex, language, religion, political views or any other distinction based on national or social origin, wealth, birth or any other status. It also suggested that the Spanish text should use "*justicia restaurativa*" rather than "*justicia restitutiva*".

32. Mexico was of the view that the text of the preliminary draft elements was too vague and suggested that it should contain a list of mediation and restorative justice measures. It also suggested that a list of minor offences or criteria for identifying and distinguishing them would be useful.

33. Norway proposed that the draft elements include principles for reparation to victims similar to those found in article 75 of the Rome Statute of the International Criminal Court.[4] It also suggested the establishment of a trust fund similar to that provided for in article 79 of the Rome Statute.

34. The Philippines suggested that the scope of application of restorative justice programmes should be more clearly delineated.

35. The United States noted that there was no single form that restorative justice must take in order to be successful and considered the use of the term "programme" too narrow. It suggested that, where a broad reference was needed, the terms "restorative-based programme", "restorative-based process" and/or "restorative justice alternative(s)" should be used to cover the full range of possibilities.

2. Comments on the definitions

36. Mexico proposed that the word "restorative" in paragraph 1 should be defined and the Philippines suggested that the term "restorative justice" should be defined. Mexico indicated that the words "any other programme" in paragraph 2 were too vague. Japan proposed that the words "often with the help" in paragraph 3 be replaced with the words "where necessary with the help". The Philippines suggested replacement of the word "encounter" in paragraph 5 with the words "restorative justice".

3. Comments on the use of restorative justice programmes

37. Commenting on paragraph 6, Mexico noted that establishing restorative justice programmes at all stages of the justice process could minimize their significance and impact. It also expressed concern about the possibility of two parallel sets of proceedings arising out of the same facts. New Zealand also disagreed with the proposition that restorative justice should be available at all stages of the criminal justice programme. Slovakia suggested that restorative justice

programmes should focus on cases involving minor offences, offences for which national law required the consent or participation of the victim to prosecute and/or offences committed by juveniles that were not too serious to warrant the use of restorative justice.

38. Commenting on paragraphs 6 and 7, the Office of the Prosecutor for the International Tribunal for the Former Yugoslavia noted that those paragraphs could not be applied unless national bodies first chose not to exercise their discretion to prosecute. Fiji and Turkey questioned the requirement of voluntariness, suggesting that the judicial process should either encourage or even compel parties to seek restorative processes in cases where "free and voluntary consent" did not exist. The United States took a different view, arguing that victims should have the right to refuse consent to participate at the outset, as well as the right to withdraw consent and revert to conventional procedures at any time during the process. The Philippines sought greater clarity about the status of elements of the process as "restorative" or not, so that it would be possible to establish when restorative processes began and ended in a particular case.

39. Japan proposed replacing the word "participation" in paragraph 8 with "participation itself" and Slovakia suggested replacing the word "acknowledge" with "know". Mexico had concerns about the policy underlying the second sentence. In its view, the participation of an alleged offender in a restorative process should be admissible as evidence of guilt in any subsequent prosecution. Commenting on paragraph 9, Fiji observed that the underlying philosophy for the parties should be that the use of restorative processes in most cases would represent a "win-win" option, making it attractive to both victims and offenders in most cases.

40. Commenting on paragraph 10, several countries had concerns about possible interaction between restorative and conventional procedures in individual cases: Fiji noted that the courts must remain the final arbiter of the type of sanction and rehabilitation measure to be imposed against the offenders; Germany called for greater clarity with respect to the nature of responsibilities for criminal justice officials; and Slovakia proposed deletion, noting that such discussions conflicted with the neutrality of the officials involved. Mexico noted that, where the offender did not take responsibility, judges should still be in a position to order the payment of compensation.

41. South Africa proposed the addition of the following new text after paragraph 10:

> "10 bis. Formal legal authorities, especially courts, should encourage parties where appropriate to resort to restorative justice measures to resolve their disputes.
>
> "10 ter. Authorities should provide programmes that engender social responsibility in young offenders and prevent recidivism."

4. Comments on the operation of restorative justice programmes

42. Several countries proposed changes to address concerns about elements they saw as missing from the draft text in this segment. The Philippines sought added and expanded references to the use of facilitators and administrators and Slovakia felt that provision should be made to ensure that resources were available for the fees and costs associated with mediation, such as those of facilitators, interpretation and translation services. Ukraine saw a need for basic safeguards and proposed including provisions parallel to those in paragraphs 6-8 in this segment. The United States proposed the title "Implementation of restorative justice principles/concepts" and suggested that the section should be written with the goal of encouraging adoption of the values on which restorative justice was based, rather than simply focusing on operational guidelines.

43. Commenting on specific provisions, Fiji noted that the guidelines and standards referred to in paragraph 11 should be required to be prescribed by law or regulation. Japan sought the deletion of the word "fundamental" from the chapeau of paragraph 12 and suggested replacement of the words "should be applied to" with the words "should be fully considered in". Regarding the right to legal advice, there were concerns that the language should protect the right to obtain advice, but not be seen as creating any right to the actual provision of legal counsel or services. Japan sought language excluding any right to appointed counsel and New Zealand pointed out that in many cases full information about the case, as opposed to legal advice, might be sufficient. Mexico felt that the right to legal advice should arise during proceedings as

well as before and after proceedings and Japan and New Zealand pointed out that access to a parent or guardian should be included in the case of a minor accused of a crime, with Japan suggesting that this apply only "where appropriate". Regarding paragraph 13, two countries expressed concerns about the confidentiality of restorative processes and sought limits or exceptions to the proposed principle. Japan sought an exception in cases where the "interest of justice" required disclosure and Mexico argued that discussions should be subject to disclosure in any subsequent criminal proceedings in cases where the restorative process was not successful. Japan proposed the deletion of paragraph 14 and Germany argued that the term "judicial discharges" should be clarified.

44. Regarding paragraphs 15 and 16, most countries (e.g. Fiji) supported the principle that where restorative processes did not bring about a satisfactory outcome, more conventional or established criminal procedures should be resorted to. Costa Rica sought language clarifying that the normal procedural requirements and safeguards would apply in such cases. Japan proposed the wording "Where restorative process is substituted for the criminal proceeding and no agreement can be made ...", as well as deletion of the second sentence of each of paragraphs 15 and 16, so that the lack of agreement in a restorative process could in fact be used as the basis for a more severe criminal sentence. Fiji proposed modification of paragraph 16 to make direct reference to the use of penal sanctions for any party failing to implement an agreement. Japan proposed the language "Where a restorative process is substituted for a criminal proceeding and the offender fails to implement an agreement made in the course of restorative process ...". Mexico sought greater clarity with respect to action to be taken in the case of non-compliance, arguing for pre-established rules for dealing with such cases. Ukraine suggested broadening the language to include cases of other infringements, such as the coercion of a party to take part in a restorative process in the language, and proposed insertion of the words "or the violation of other principles of restorative justice" after the words "a restorative process".

5. Comments on provisions dealing with facilitators

45. Mexico expressed several concerns about facilitators, calling for greater certainty with respect to qualifications and functions. It suggested that experts in criminal law should be included as facilitators, that decisions of facilitators should require a legal basis and that a detailed knowledge of the system should be required to ensure that victims were advised of all their options.

IV. Conclusion

46. Most of the countries that provided written comments on the preliminary draft elements supported the idea of promoting restorative justice measures in criminal justice systems. Restorative justice would serve as a supplement to established criminal justice practices, especially in areas where such practices had not functioned adequately. Many States had already incorporated some restorative justice measures into their criminal justice systems, but they still considered that the application of restorative justice measures was at an exploratory stage and there were further possibilities to be explored and developed. Thus, most of the countries responding welcomed the opportunity to exchange views and information and supported the holding of a meeting of experts on the subject. The establishment of an international instrument on restorative justice, such as the preliminary draft elements, was also considered beneficial for States as a guideline for the application of restorative justice measures.

47. However, not all respondents were in support of the development of an international instrument and some were cautious about its application and operation. Many respondents provided various comments on the preliminary draft elements. While there were many common elements, each country had its own criminal justice system based on its culture, customs and social structures. Restorative justice offered promising concepts and options if taken as a supplement to established criminal justice practices, but these must be taken in the context of established national practices and the social, cultural, economic and other circumstances in which they were developed. When an international instrument was developed, it should take into account such factors. A normative instrument setting non-binding guidelines was seen as more practical and feasible. The Commission on Crime Prevention and Criminal Justice may wish to consider these points when it develops common principles on

the use of restorative justice during its eleventh session.

48. Both the participants in the meeting of the Group of Experts and the majority of those responding to the note verbale expressed the view that restorative justice in general should serve as a complement to established justice systems and practices and that it should not be seen or understood as an effort to replace existing systems. It was also clear, however, that specific restorative processes or outcomes did, in some cases, effectively replace individual elements of established systems. For example, following some preliminary determination that such a replacement was appropriate having regard to the nature of the case involved, mediation could replace some or all elements of a conventional trial and restorative outcomes sometimes replaced conventional sentences in appropriate cases. In its discussions and in its report, the Group of Experts referred to restorative justice as "complementing" established criminal justice, while referring only to the use of restorative justice as a "replacement" in the context of specific criminal justice practices that may be replaced by restorative ones. It should be understood that restorative justice is not intended as a replacement for criminal justice per se and members of the Group of Experts did not want references to "replacement" interpreted more broadly than intended.

Notes

[1] See *Tenth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Vienna, 10-17 April 2000: report prepared by the Secretariat* (United Nations publication, Sales No. E.00.IV.8).

[2] *Official Records of the Economic and Social Council, 2001, Supplement No. 10* (E/CN.15/2001/30/Rev.1), part two, chap. I, sect. A, draft resolution II, annex, sect. XV.

[3] Norwegian official document, NOU 1992:15.

[4] A/CONF.183/9.